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No. 79-6777

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

ORIGINAL COPY

GARY KEITH STEAGALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether evidence seized as a result of officers' entry into petitioner's residence, armed with an arrest warrant for a third party whom they had probable cause to believe was present, should have been suppressed because of the officers' failure to procure a search warrant.

2. Whether there was probable cause to believe that the subject of the arrest warrant was at the location in question.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 606 F.2d 540, and an opinion modifying it in part (Pet. App. 11-12) is reported at 615 F.2d 642.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1979. A petition for rehearing was granted in part, and the original opinion was modified on April 14, 1980. On May 13, 1980, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to June 13, 1980, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of possessing cocaine with intent to distribute it and of conspiracy to commit that offense, in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to five years' imprisonment, to be followed by a three-year special parole term.

1. The evidence at trial showed that petitioner and co-defendant Hoyt Albert Gaultney[1/] operated a scheme

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1/ Gaultney was convicted in a separate trial on the same charges for which petitioner was convicted and, in addition, on one count of unlawful importation of cocaine (21 U.S.C. 952(a)). His conviction was affirmed, along with petitioner's, in a joint opinion.

to distribute large quantities of cocaine that had been smuggled into this country from Colombia, South America. Petitioner and Gaultney used a dummy import company as a front for their illicit activities (see 2 Tr. 126, 132-133).[2/] The cocaine was concealed in the hollowed-out wooden bases of tables imported from Colombia (2 Tr. 120-123, 159, 162-163, 173-174, 180-184).

A search on January 18, 1978, of a house occupied by petitioner, Gaultney, and Gaultney's wife revealed more than 42 pounds of cocaine, and a later search of the import company's warehouse, which was leased in petitioner's name, produced another pound of cocaine still hidden in one of the table bases (Pet. App. 5; 1 Tr. 25, 55, 58-60, 65-66; 2 Tr. 120-123, 309-210, 213, 215, 218).

The circumstances surrounding the search of the residence are fully set forth in the opinion of the court of appeals (Pet. App. 3-5). On January 4, 1978, DEA Agent Joseph Rassey was contacted by an informant whom he had known for about five years and who had provided information leading to seven arrests, three of which resulted in convictions and four of which were still pending (Pet. App. 3-4 n.2). The informant said he could locate a Ricky Lyons, for whom a federal arrest warrant was outstanding, and a Georgia state fugitive name "Jimmy", who was using the alias "Carl James"

2/ "Tr." refers to the trial transcript, which is in two volumes. "H.Tr." refers to the three-volume transcript of the suppression hearing.

(Pet. App. 3-4). The informant telephoned Agent Rassey again on January 14 and gave him a telephone number where Lyons and Jimmy could be reached in the Atlanta, Georgia, area (Pet. App. 4). Agent Rassey conveyed this information to Agent Kelly Goodowens in the DEA's Savannah, Georgia, office on Monday, January 16 (ibid.). Agent Goodowens, who was aware of Lyons' previous indictment for marijuana smuggling, found that an arrest warrant was still pending for Lyons. With the help of the telephone company, Agent Goodowens then learned that the number provided by Rassey's informant was located at a rural address in Buford, Georgia (ibid.).

Rassey's informant contacted him several times on January 16-18; each time, the informant confirmed that Lyons and Jimmy were still at the number (ibid.). The informant also advised Agent Rassey that as many as four or five other people would be with Lyons (ibid.; 2 H.Tr. 48). Rassey passed this additional information on to Goodowens, the last conversation occurring on the morning of January 18 (Pet. App. 4). That same afternoon, Goodowens and two other agents located the address at which the telephone number was listed. The agents drove past the house; they saw an old Volkswagen parked in the driveway and smoke coming from the chimney, but no people were visible (ibid.; 1 H.Tr. 24).

About 25 minutes later, the agents coordinated plans with assisting officers for the execution of the arrest warrant on Lyons, who was believed to be armed and dangerous (Pet. App. 4; 1 H.Tr. 24-25; 2 H.Tr. 3-4, 5-). As they approached the house, Agents Goodowens and Smith noticed two

men near the Volkswagen. Agent Smith first thought one of the men was Lyons, but upon realizing his mistake, continued to the house. The two men were detained; one was petitioner, and the other was Gaultney, who was armed (Pet. App. 4).

Agent Smith then went to the house, where he was greeted by Gaultney's wife (ibid.). Smith told her that he was a police officer with a warrant for Ricky Lyons' arrest, and he asked Mrs. Gaultney if Lyons was in the house (ibid.). When she replied that there was "no one by that name" in the house, Smith directed her to place her hands on the wall and had another officer watch her; Agent Smith then made a sweep search of the residence (id. at 4-5). He first looked in a bathroom, then proceeded to a bedroom because he saw light from beneath the door (id. at 5). Inside this room Agent Smith saw a small table on which were a set of triple beam balance scales and a plastic bag containing a white powder (ibid.). Smith then completed the sweep search of the house; he found neither Lyons nor anyone else. After summoning the other agents into the house, Agent Smith left for Atlanta to obtain a search warrant for the house (ibid.). Later that evening, Agent Smith telephoned the agents who had remained behind to advise them that the U.S. Magistrate had issued the warrant.

At about this time, a truck arrived at the house. Based on information they had received from Gaultney, the agents believed that "Jimmy," the state fugitive Agent Rassey's informant had mentioned, was in the truck (Pet. App. 5). This individual was detained upon his entry into the house,

and although he refused to identify himself, he later was determined to be James Albert Smith, who was wanted by state authorities on drug charges. He was carrying a driver's license in the name of "Carl James" (ibid.).

A warrant-authorized search of the house followed, revealing various narcotics processing equipment and approximately 43 pounds of almost pure cocaine (ibid.).

2. Petitioner moved to suppress this evidence at trial for failure of the DEA agents to have a search warrant for the initial entry. The district court denied his motion, and the court of appeals affirmed on the basis of its earlier decision in United States v. Cravero, 545 F.2d 406, 421 (5th Cir. 1976), cert. denied, 429 U.S. 1100 & 430 U.S. 983 (1977), which held that a police officer who possesses a valid arrest warrant and who reasonably believes that the subject of the warrant is in a third party's residence need not obtain a search warrant to enter the premises for the purpose of arresting the subject (Pet. App. 5-6, 12). Judge Kravitch dissented. She was of the view that the circumstances here did not meet the requirements of Cravero (Pet. App. 9 & 615 F.2d at 644) [3/] and that, in any event, Cravero represented "a rule of questionable validity and wisdom" (615 F.2d at 644).

3/ The appendix to the copy of the petition we have received does not contain Judge Kravitch's dissent to the modification of the opinion on rehearing, reported at 615 F.2d 642, 644.

ARGUMENT

Petitioner correctly states that the courts of appeals are divided on the question whether law enforcement officers, having obtained an arrest warrant and possessing probable cause to believe that the person named in the warrant is at the home of a third party, must in addition secure a search warrant in order to enter those premises to search for and arrest the suspect. Compare, e.g., United States v. Cravero, 545 F.2d 406, 42 (5th Cir. 1976), cert. denied, 429 U.S. 1100 and 430 U.S. 983 (1977); United States v. McKinney, 379 F.2d 259, 262-263 (6th Cir. 1967) (issuance of an arrest warrant is an "exceptional circumstance" allowing a search, in light of the mobility of suspect);[4/] and United States v. Harper, 550 F.2d 610, 613-614 (10th Cir.), cert. denied, 434 U.S. 837 (1977) (arrest warrant sufficient; dwelling may have been defendant's own residence) with Government of the Virgin Islands v. Gereau, 502 F.2d 914, 928-930 (3d Cir. 1974), cert. denied, 420 U.S. 909 (1975) (admitting evidence in light of the existence of exigent circumstances); Fisher v. Volz, 496 F.2d 333, 338-342 (3d Cir. 1974) (dictum); Wallace v. King, No. 78-1399 (4th Cir. July 1, 1980).

4/ In United States v. Shye, 492 F.2d 886 (6th Cir. 1974), cited by petitioner (Pet. 21), the Sixth Circuit upheld, on a showing of exigent circumstances, a warrantless entry to effect arrests of bank robbers. Because police had not obtained arrest warrants, the court had no reason to address the question whether the same exigent circumstances showing would be necessary if the police had possessed arrest warrants and probable cause to believe the subjects of the warrants were within the apartment they entered.

We agree that this issue is a significant one that may require consideration by this Court in an appropriate case, but we do not agree that this is such a case. The entry in question here took place on January 18, 1978. At that time, the action of the agents complied with the applicable law of the Fifth Circuit (United States v. Cravero, supra), where the entry occurred.[5/] Since the agents' actions conformed to the applicable law at the time of the search, the deterrent purposes of the exclusionary rule could not possibly be furthered by a decision at this date that their actions violated the Fourth Amendment, although they had no way of knowing it at the time. In such circumstances, suppression of the evidence and reversal of petitioner's conviction is not appropriate. See Michigan v. De Fillipo, 443 U.S. 31 (1979); Bowen v. United States, 422 U.S. 916 (1975); United States v. Peltier, 422 U.S. 531, 535-542 (1975).[6/]

5/ Indeed, at the time of the search no court of appeals except the Third Circuit (Government of the Virgin Islands v. Gereau, supra) had held the procedure followed here to be invalid. Moreover, in Cravero itself one of the defendants had sought review by this Court on this precise issue, and certiorari was denied despite the United States' acquiescence. Cook v. United States, 430 U.S. 983 (1977).

6/ Petitioner suggests (Pet. 9-11) that the scope of the search following the entry but preceding issuance of the search warrant exceeded that which might be proper as a search for Lyons or as a self-protective search incident to the arrests of petitioner and his co-defendants under United States v. Chimel, 395 U.S. 752 (1969). Petitioner has not, however, specified that as a question for this Court's review, nor did he raise it in the court below. Accordingly, we do not address it here.

It is arguable that this Court's decision on the closely related issue of an entirely warrantless entry into a suspect's home in Payton v. New York, No. 78-5420 (April 15, 1980), casts doubt upon the continuing validity of the Fifth Circuit's rule. This, however, is simply an additional reason to decline review of this issue in connection with searches antedating the Payton decision, since it is possible that courts previously upholding arrest warrant entries into third party premises will reconsider the question in light of Payton and reach a different conclusion.[7/]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1980

7/ We are advised that it is the present policy of the Drug Enforcement Administration, whose agents conducted the search in the present case, to secure a search warrant prior to making an arrest entry into third party premises, in the absence of exigent circumstances or consent.